STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM WAYNE COUNTY CIRCUIT COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., a Michigan non-profit corporation; DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, a Michigan non-profit corporation; ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, a Michigan non-profit corporation; and SIERRA CLUB, a California corporation,

Petitioners-Appellees,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Department of the Executive Branch of the State of Michigan; and DAN WYANT, Director of the Michigan Department Of Environmental Quality,

Respondents-Appellees,

v.

AK STEEL CORPORATION, a Delaware corporation,

Intervening Respondent-Appellant.

Supreme Court No. 154526
COA No. 326485
Lower Court No. 14-008887-AA

APPELLANT AK STEEL CORPORATION'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED BY THIS COURT

Pursuant to the Court's Order of April 7, 2017, Intervening Respondent-Appellant AK Steel Corporation files this Supplemental Brief addressing the following two questions:

I. Whether MCL 324.5505(8) and MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit to install for an existing source that the Petitioners are seeking to challenge?

II. If Question I is answered in the negative, whether the issuance of that permit was a decision of that agency subject to the contested case provisions of the Administrative Procedures Act, such that the time period for filing a petition for judicial review set forth in MCR 7.119(B)(1) applies, rather than the time period established by MCR 7.123(B)(1) and MCR 7.104(A)?

ARGUMENT

I. The Court of Appeals properly held that MCL 324.5505(8) and MCL 324.5506(14) do not prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit.

The court of appeals properly ruled that MCL 324.5505(8) and MCL 324.5506(14) do not prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of a permit to *install* for existing sources. When read in context, MCL 324.5506(14) addresses only appeals relating to permits to *operate* for existing sources issued under Section 5505(6); it does not address permits to *install* for existing sources issued under Section 5505.

Issuance of permits to install is governed by MCL 324.5505. In general, a permit to install authorizes a company to install or modify a source of air emissions, as opposed to an operating permit which authorizes a company to operate a source of air emissions. Section 5505(8) creates a right of appeal for the issuance or denial of permits to install and other permits issued under Section 5505, but *only* for permit decisions related to *new* sources. For *existing* sources, Section

5505(8) creates no right of appeal, but instead references Section 5506(14) for the determination of what appeals of permit actions are available:

> Any person may appeal the issuance or denial by the department of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), for a *new source* in accordance with section 631 of the revised judicature act of 1961, 1961 PA 236, MCL 600.631. Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. Appeals of permit actions *for existing sources* are subject to section 5506(14).

The final sentence of Section 5505(8) refers the reader to Section 5506(14) for a determination of what appeals of permit actions for *existing* sources do or do not exist.

Section 5506 pertains exclusively to operating permits, not permits to install. However, as indicated by the last sentence of Section 5505(8), the subsection of Section 5506 addressing appeals – Section 5506(14) – does interlock with Section 5505. The first part of Section 5506(14) states as follows:

> A person who owns or operates an *existing source* that is required to obtain an operating permit under this section, a general permit, ***or a permit to operate authorized under rules promulgated under section 5505(6)***, may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 and 24.328 of the Michigan Compiled Laws. . . .

MCL 324.5506(14) (emphasis added). This portion of Section 5506(14) clearly provides a right of appeal for certain types of permits associated with existing sources, including permits to *operate*

issued under Section 5505(6). This right of appeal is different from that provided for new sources under Section 5505(8) in that is applies only to persons owning or operating existing sources and applies the contested case and judicial review provisions of the Administrative Procedures Act. However, the terms of Section 5506(14) do not include authorization of appeals of "permits to install," a term that appears nowhere in Section 5506(14) or in the cross-reference contained at the end of Section 5505(8).

The Environmental Groups rely on the second part of Section 5506(14), which makes no mention of permits to install or other permits for existing sources issued under Section 5505, in order to derive a right of appeal for permits to install associated with existing sources. The second part of Section 5506(14) states as follows:

> . . . Any person may appeal the issuance or denial of an **operating permit** in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. **A petition for judicial review is the exclusive means of obtaining judicial review of a permit** and shall be filed within 90 days after the final permit action. Such a petition may be filed after that deadline only if it is based solely on grounds arising after the deadline for judicial review and if the appeal does not involve applicable standards and requirements of the acid rain program under title IV. Such a petition shall be filed within 90 days after the new grounds for review arise.

MCL 324.5506(14) (emphasis added). As is apparent, this language closely resembles the language of Section 5505(8) which created a right of appeal for "a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6)" for new sources. However, in this portion of Section 5506(14), the creation of a right to appeal was limited to issuance or denial of "an operating permit." As demonstrated by Section 5505(8), the Legislature clearly knew how to create a right of appeal for other types of permits, but did not do so here.

Because Section 5506(14) does not create a right of appeal for all types of permits, the Environmental Groups search beyond the sentence in Section 5506(14) creating the right to appeal "an operating permit" and focus on the following sentence in order to find an implied right to appeal all types of permits. The Environmental Groups argue that the use of the indefinite article "a" in the following sentence – "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action." – demonstrated the Legislature's intent to authorize appeals of permits, without limitation as to the type of permit.

The court of appeals properly rejected the Environmental Groups' interpretation of Section 5506(14) and explained:

> There is no question that the first sentence pertains only to appeals related to the issuance or denial of *operating permits*. The parties differ on whether the second sentence above, which mentions "a permit," refers to the "operating" permit from the preceding sentence or "any" permit. See *Allstate Ins Co v Freeman*, 432 Mich 656, 744; 443 NW2d 734 (1989), citing Black's Law Dictionary (5th ed) (noting that the article "a" often is used to mean "any"). The circuit court, while acknowledging that the second sentence "appears within the context of this subsection's discussion of operating permits," nonetheless ruled that the second sentence allowed the appeal of any permit based exclusively on the view that "a" is to be interpreted as "any."
>
> We disagree with the circuit court's ultimate interpretation and agree with AK Steel that the sentence in question refers to the preceding sentence. Thus, the statement, "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action," simply relates back to the preceding sentence, which described how any person can appeal the issuance or denial of an operating permit.

July 12, 2016 Court of Appeals Decision, at 4 (emphasis in original). (**Exhibit B to AK Steel's Application for Leave to Appeal.)**

The Environmental Groups argue that the court of appeals' interpretation of Section 5508(14) ignores the cross-reference from Section 5505(8) that refers the reader to Section 5506(14) for appeals of permits for existing sources, rendering it empty surplus. But, contrary to the argument of the Environmental Groups, the cross-reference to Section 5506(14) found at end of Section 5505(8) is not superfluous under the court of appeals' interpretation. It calls the reader's attention to the fact that appeals of operating permits for existing sources issued pursuant to Section 5505(6) are addressed in Section 5506(14). However, this cross-reference is limited by the provisions of Section 5506(14), and it does not include authorization of appeals of "permits to install," a term that appears nowhere in Section 5506(14) nor in the cross reference contained at the end of Section 5505(08). Under section 5506(14), the creation of a right to appeal was limited to the issuance or denial of "an operating permit."

Additionally, the Environmental Groups' insistence that Section 5506(14), in using the indefinite article "a," authorizes the appeal of *all* permits, is fatally flawed under Michigan's principles of statutory interpretation. "In construing a statute, [the court's] purpose is to ascertain and to give effect to the Legislature's intent." *Donajkowski v Alpena Power Co*, 460 Mich 243, 248 (1999). "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id.* "[S]tatutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 1 (2010) (emphasis in original). "An attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort legislative intent." *Speicher v Columbia Township Bd of Trustees*, 497 Mich 125, 138 (2014). When read in context, the sentence erroneously relied upon by the Environmental Groups to create a right of appeal for permits to install for existing sources is one

of limitation on the right created in the prior sentence, not one expanding the right of appeal created in the prior sentence. When the sentences are read together, there was no need for the Legislature to restate what it had just said about the scope of the right to appeal being created. The words of limitation that the Environmental Groups used to expand the right of appeal simply clarify that the previously stated right of appeal for operating permits is an exclusive remedy and must be exercised within 90 days. It does not add a new right of appeal for types of permits not discussed in the immediately preceding sentence.

Moreover, under the Environmental Groups' interpretation of Section 5506(14), the result is that all permits to install issued under Section 5506, whether for new or existing sources, would be granted the same right of judicial review to be exercised within the same 90-day time frame. This interpretation obliterates the Legislature's express decision to limit the right to appeal issuance of permits to install within 90 days to new sources in Section 5505(8). The Environmental Groups offer no explanation as to why the Legislature would expressly exclude permits to install for existing sources from this right to appeal in Section 5505(8), and then elsewhere impliedly grant the exact same right to appeal for permits to install for existing sources. If the Legislature had intended that appeals of permits to install be treated exactly the same for both new sources and existing sources, then there would have been no reason to make this distinction in the first place.

In addition, AK Steel recognizes that the use of the indefinite article "a" as opposed to the definite article "the" can be of significance in statutory interpretation. However, the Environmental Groups' reliance on the Legislature's use of the indefinite article "a" as the sole basis for its interpretation of Section 5506(14) strains the importance of this use of syntax to the breaking point and beyond.

First, when read in the context of the preceding sentence which creates the right of appeal for "operating permits," the use of the indefinite article "a" is a perfectly appropriate method of referring to any operating permit that would be subject to appeal. This provision of Section 5506(14) is simply referring to any operating permit, not a particular operating permit. Had the Legislature used the definite article "the" before the word "permit" in the sentence of Section 5506(14) at issue, the language of the statute might have implied that a singular operating permit exists for any particular source that is subject to appeal. Such usage would have created unwanted confusion. Section 5506 clearly provides that a particular source may have numerous operating permits issued over time, either due to the requirement that operating permits are of limited duration and subject to renewal or because modifications require issuance of new operating permits. Thus, the Legislature's decision to use the indefinite article "a" before the word "permit" merely denotes that any decision to issue or deny any operating permit associated with a single source is subject to judicial review within 90 days.[1] It does not denote that the Legislature has departed from the notion that these permits are operating permits, as indicated by the immediately preceding sentence which is being limited by the sentence interpreted by the Environmental Groups. The Environmental Groups simply erroneously and unnecessarily stretch the use of this single word beyond its intended purpose in arriving at their construction of Section 5506(14).

[1] Similarly, in *Badeen v Par, Inc*, 300 Mich App 430 (2013), *vacated in part on other grounds*, 496 Mich 75 (2014), the Court of Appeals determined that use of the indefinite article "a" in MCR 3.501(B)(1) requiring a plaintiff to move for class certification within 91 days of the filing of "a complaint" simply meant that the 91-day period began upon filing of "any" complaint that included class action allegations. Therefore, the Court of Appeals held that the Rule contemplated that more than one complaint may be filed in a single action and that the 91-day period renewed upon the filing of an amended complaint.

Second, the Legislature demonstrated its ability to clearly delineate the types of permits subject to appeal in Section 5505(8). In Section 5505(8), the Legislature specified that "a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6)" may be appealed before using generic language to specify that this right to judicial review is an exclusive remedy and must be exercised within 90 days. In Section 5506(14), the Legislature specified that "an operating permit" may be appealed before using very similar generic language to specify that this right to judicial review is an exclusive remedy and must be exercised within 90 days. It is improper for the Environmental Groups to construe this generic language in the latter case to expand the right of appeal to include permits to install, when the Legislature clearly knew how to include permits to install when creating a right of appeal as demonstrated by Section 5505(8).

Third, the Environmental Groups' interpretation makes the sentence in Section 5506(14) creating a right to appeal for "an operating permit" superfluous. If, as the Environmental Groups argue, the following sentence clarifying that the right to judicial review is an exclusive remedy and must be exercised within 90 days actually creates a right of appeal for all types of permits, then it creates a right to appeal for operating permits as well. There would have been no reason for the Legislature to include the immediately prior sentence creating a right of appeal for operating permits. The Michigan Supreme Court has consistently cautioned in recent decisions that reading words, phrases, or sentences in isolation can result in improper statutory interpretation similar to the erroneous statutory interpretation urged by the Environmental Groups.

For example, in *Speicher*, *supra*, the Supreme Court overruled a line of Court of Appeals holdings that allowed plaintiffs to recover actual attorney fees and court costs if they succeeded in

obtaining declaratory relief in civil actions to compel compliance with the Open Meetings Act. The Supreme Court's ruling was based on its interpretation of MCL 15.271(4), which provided:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

The Supreme Court acknowledged that, read in isolation, the phrase "succeeds in obtaining relief in the action" omits the word "injunctive" before the word "relief" and could be read to include other types of relief. 497 Mich at 137. However, the Supreme Court ruled that the phrase "succeeds in obtaining relief in the action" cannot be divorced from the phrases that precede it, and that the Supreme Court could not conclude that the Legislature intended such a result "simply by omitting an implied modifier" and failing to repeat the word "injunctive" before the word "relief" a second time. *Id*. at 141-43. Rather, the Supreme Court concluded that only a strained reading prevents the obvious conclusion that the second mention of "relief" is a direct reference to the prior mention of "injunctive relief," and that a reasonable reader of MCL 15.271(4) would understand that a plaintiff must succeed in obtaining "injunctive relief" in order to recover court costs and actual attorney fees. *Id*.

Similarly, in *Robinson v City of Lansing*, 486 Mich 1 (2010), the Supreme Court reviewed the statutory "two-inch rule" contained in MCL 691.1402a, which provided a rebuttable inference that sidewalk defects of two inches or less are maintained in "reasonable repair." The issue under review was whether the "two-inch rule" applied only to municipal liability for sidewalks adjacent to county highways or to municipal liability for sidewalks adjacent to all highways. The first subsection of MCL 691.1402a limited municipal liability for defective sidewalks adjacent to "a county highway" unless the municipality knew, or should have known, of the defect proximately causing the injury for at least 30 days before the injury occurred. The second subsection of MCL

691.1402a codified the "two-inch rule" for sidewalks adjacent to "the improved portion of the highway," but did not reference "county highways." The Supreme Court held that despite the lack of repetition of a reference to "county highways" in the second subsection, the "two-inch" rule only applied to sidewalks adjacent to county highways. *Id*. at 10-13. The Supreme Court provided six reasons in support of its interpretation of the "two-inch rule."

First, the Supreme Court noted the proximity of the first and second subsections, and that nothing in the second subsection suggests that its scope was intended to be more expansive than the first subsection. *Id*. at 13-14. Second, the Supreme Court noted that the syntax of the second subsection, referring to "the highway," indicated that the Legislature was referring to a particular highway, in this case the previously referenced "county highway."[2] *Id*. at 14-15. Third, the Supreme Court stated that the second subsection could not be read in isolation. When read in context alongside the first subsection, the Supreme Court found that it was clear that both subsections only applied to county highways. *Id*. at 15-16. Fourth, the Supreme Court stated that the Legislature is not required to be overly repetitive in its choice of language. It found that a reasonable person would understand that each subsection applied only to county highways despite the lack of repetition, and that is was incumbent upon the Legislature to affirmatively indicate that the scope of the provisions was expanding in subsequent references to "the highway." *Id*. at 16-17. Fifth, the Supreme Court held that "unless the Legislature indicates otherwise, when it

[2] Although one of the six factors considered by the *Robinson* court was the statute's use of the definite article "the" before the word "highway," this does not suggest that the Environmental Groups' singular focus on the use of an indefinite article before the word "permit" in the present case to reach their proposed statutory interpretation is correct. First, the Environmental Groups' focus on this single factor and their failure to make a comprehensive analysis of the statutory language in context is clearly contrary to the approach to statutory interpretation required by *Robinson* and similar Supreme Court cases. Second, as argued *supra* at pp. 7-8 and fn. 1, even in isolation, the statute's use of the indefinite article "a" in this case does not support the Environmental Groups' statutory interpretation.

repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Id*. at 17. Finally, the Supreme Court relied on the principle that statutory provisions should not be construed in a manner that renders language within those provisions meaningless. Therefore, its interpretation was correct because unless the "two-inch rule" was limited to sidewalks adjacent to county highways it would be nothing more than a restatement of pre-existing Michigan law. *Id.* at 17-21.

The Supreme Court applied similar principles in *McCahan v Brennan*, 492 Mich 730 (2012), in which it interpreted the notice provision of the Court of Claims Act, MCL 600.6431. The first subsection of MCL 600.6431 barred any claim against the state unless the claimant filed written notice of her intention to file a claim within one year after the claim accrued. The third subsection of MCL 600.6431 stated that written notice must be filed within six months of the event giving rise to the cause of action in all actions for property damage or personal injury, but did not repeat the language of subsection one stating that no claim may be maintained against the state unless the notice requirement was met. *Id*. at 736-38. The Supreme Court held that a reasonable person reading the statute would understand that the two subsections were related and interdependent, and that the third subsection was properly understood as modifying the generally applicable one-year filing requirement of the first subsection and subject to the same limitations as the first subsection without the need for repetition. The Supreme Court stated that the third subsection could not be read in isolation as applying to all actions for property damage or personal injury, but instead must be understood as a cohesive whole with the first subsection as applying only to actions against the state and subject to the same bar-to-claims language contained only in the first subsection. *Id*. at 739-42.

As in these recent decisions of the Supreme Court, in the present case, the words "a permit" must be read in context, rather than isolation. A reasonable reader of Section 5506(14) would understand that there was no need to repeat the word "operating" a second time to modify the word "permit" in the following sentence, when the two sentences are interdependent. The second sentence merely limits the right of appeal created in the first sentence for operating permits, by making judicial review the exclusive remedy and requiring it to be initiated within 90 days. As stated by the Supreme Court, the Legislature simply is not required to repeat itself in order to be understood.

Had the Legislature wished to suddenly expand the types of permits subject to appeal under Section 5506(14), it was incumbent on the Legislature to affirmatively indicate that the scope of appealable permits was expanding. The Legislature did not do so, and the Environmental Groups are incorrect in expanding the next reference to "a permit" to include all types of permits, including permits to install.

As demonstrated by Section 5505(8), the Legislature clearly knew how to create a right of appeal for permits to install in express terms, and did so with respect to new sources. The Environmental Groups' erroneous interpretation not only ignores this fact, but it creates a right of appeal for permits to install with respect to existing sources that renders the distinction made by the Legislature between new and existing sources in Section 5508 meaningless. For all of these reasons, and consistent with recent Supreme Court direction on proper statutory interpretation, Section 5506(14) does not provide for judicial review of the issuance of permits to install.

II. The Court of Appeals erred in ruling that the contested case provisions of Chapter 4 of Michigan's Administrative Procedures Act applied to MDEQ's decision to issue a permit to install to AK Steel.

The court of appeals erred in this case because the *public* hearing required prior to issuance of a permit to install under Michigan's Natural Resources and Environmental Protection Act ("NREPA") is not an *evidentiary* hearing as described by the APA's contested case provisions. When read in context, the phrase "opportunity for hearing" in MCL 24.291(1) does not trigger application of the APA's contested case provisions when only a *public* hearing is required by statute.

This erroneous holding was the sole basis that the court of appeals used to determine that the correct time period for the Environmental Groups to file their claim of appeal was the 60-day period of MCR 7.119 for agency decisions where the APA applies. Without this holding, the catch-all provision of MCR 7.123 would apply, allowing only 21 days for appeal, and the trial court's decision denying AK Steel's motion to dismiss the Environmental Groups' untimely claim of appeal for lack of jurisdiction must be reversed.

A. When MCL 24.291(1) is read in harmony with the definition of "contested case" in MCL 24.203(3) it is clear that the APA's contested case provisions only apply when the petitioner is entitled to an *evidentiary* hearing; the type of *public* hearing provided under NREPA for issuance of permits to install is not an evidentiary hearing and therefore the APA's contested case provisions did not apply to MDEQ's decision.

The court of appeals based its decision on MCL 24.291(1), which states: "When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of [the APA] governing a contested case apply." Because the issuance of PTI 182-05C was required to be

preceded by public notice and a public hearing,[3] the court of appeals concluded that the contested case provisions of Chapter 4 of the APA applied. *See* July 12, 2016 Decision, at 7. In reaching this holding, the court of appeals necessarily must have concluded that the phrase "opportunity for hearing" in MCL 24.291(1) meant any type of hearing, including a public hearing, and was not limited to the evidentiary hearings that are a sine qua non of contested case proceedings.[4]

The APA does not define the meaning of the word "hearing." In fact, it clearly recognizes that there are different types of hearings. In MCL 24.203(3), the APA defines "contested case" as "a proceeding, including . . . licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an *evidentiary* hearing." (emphasis added). Separately, the APA uses the term "public hearing" to describe the type of hearing required before an agency adopts a rule. MCL 24.241(1). The APA expressly states that this public hearing "is not subject to the provisions governing a contested case." MCL 24.241(4). Thus, the APA clearly recognizes that some types of hearings are not subject to the APA's contested case provisions.

When reading the phrase "opportunity for hearing" in MCL 24.291(1), the Court must determine what type of hearing is required to trigger the APA's contested case provisions. "[S]tatutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 1 (2010) (emphasis

[3] MCL 324.5511(3) provides that MDEQ "shall not issue a permit to install . . . for a major source . . . under title I of the clean air act . . . without providing public notice, including offering an opportunity for public comment and a public hearing on the draft permit . . . ."

[4] The court of appeals did not appear to be operating under the mistaken assumption that the public hearing held by MDEQ was actually a contested case evidentiary hearing. Instead, the court of appeals noted that a "public hearing" had been held on March 19, 2014. July 12, 2016 Decision, at 7, n. 3. As set forth below, "public hearings" and "contested case hearings" are not the same thing, and there is no support in the record for the notion that the March 19, 2014 public hearing held by MDEQ was actually a contested case evidentiary hearing.

in original). "An attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort legislative intent." *Speicher v Columbia Township Bd of Trustees*, 497 Mich 125, 138 (2014). When MCL 24.291(1) and MCL 24.203(3) are read in harmony, the APA's overall statutory scheme makes clear that the APA's contested case provisions apply only when there is an opportunity for an evidentiary hearing. An opportunity for a public hearing is simply insufficient to convert the licensing process into a APA contested case proceeding.

Chapter 4 of the APA, which contains the provisions related to contested case proceedings, sets forth certain rights and obligations with respect to an evidentiary hearing, including: (1) "an opportunity to present evidence and argument on issues of fact" (MCL 24.272(3)); (2) the right to "cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence" (MCL 24.272(3)); (3) the right to "submit rebuttal evidence" (MCL 24.272(4)); (4) the right to have subpoenas issued "requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control" (MCL 24.273); (5) discovery of prior statements and reports authored by agency witnesses and discovery of other agency records (MCL 24.274(2)); (6) application of the rules of evidence as applied in nonjury civil cases in circuit court as far as practicable (MCL 24.275); and (7) findings of fact based exclusively on the evidence and matters officially noted (MCL 24.285).

Conversely, the public hearing required by NREPA prior to MDEQ's issuance of PTI 182-05C was not an evidentiary hearing subject to the APA's contested case procedures. MCL 324.5511(3) which requires an opportunity for a public hearing on a draft permit to install does not reference the APA or its contested case provisions, and it does not require that the public

hearing have any of the indicia of an evidentiary hearing. MCL 324.5516 requires only that the public hearing be conducted by disinterested and technically qualified persons, and that copies of certain information be made available to the public to the extent provided by the Freedom of Information Act, MCL 15.231 to 15.246. Simply put, the public hearing that was required before MDEQ issued PTI 182-05C was not an evidentiary hearing, because NREPA does not require an evidentiary hearing for issuance of permits to install. Indeed, the Environmental Groups appear to have understood this fact, because they did not request an evidentiary hearing in connection with issuance of PTI 182-05C, nor did MDEQ afford them such an opportunity.[5]

There is a clear distinction between the right to a public hearing and the right to an evidentiary hearing under the contested case procedures of the APA. In *Twp of Midland v Michigan State Boundry Commission*, 401 Mich 641, 259 NW2d 326 (1977), this Court distinguished between the right to a public hearing and the right to an evidentiary hearing within the meaning of the APA, holding:

> An annexation proceeding is not a "contested case" even though the Commission must hold a public hearing and representatives of a city, village or township and other persons have a right to be heard at such a hearing before the Commission makes its determination. That procedural right does not create any substantive legal right in a "named party" and, hence, the "legal rights" of a "named party" are not required by the [annexation statutes] to be determined after an opportunity for an evidentiary hearing within the meaning of the Administrative Procedures Act.
>
> The Administrative Procedures Act was designed to provide procedural protection where a personal right, duty or privilege is at stake. Affording the public at large an opportunity to be heard does not create a personal right in the decision . . . .

[5] As discussed in Section II.B below, MDEQ no doubt understood that it was not empowered to hold a contested case evidentiary hearing on PTI 182-05C under the holding in *Wolverine Power Supply Cooperative, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 777 NW2d 1 (2009).

Id. at 671, 259 NW2d at 341.

MCL 24.291(1) does not create a right to any type of hearing on its own terms. In the context of issuance of permits, as opposed to revocation or suspension of an existing permit, a contested case evidentiary hearing is only available when required by another statute. *See Maxwell v Michigan Dep't of Environmental Quality*, 264 Mich App 567, 572; 692 NW2d 68 (2004) ("this Court observed that the contested-case provisions of the APA do not apply to the issuance of initial permits by the Department of Natural Resources unless specifically required by statute"), citing *Bois Blanc Island Twp v Natural Resources Comm*, 158 Mich App 239, 244; 404 NW2d 719 (1987).

Here, the right to a public hearing under NREPA is not equivalent to the right to an evidentiary hearing under the contested case provisions of the APA. MCL 24.291(1)'s reference to an "opportunity for hearing" should be read in harmony with the definition of "contested case" in MCL 24.203(3) to require an opportunity for an evidentiary hearing as contemplated by the APA's contested case provisions. NREPA's requirement of a public hearing prior to issuance of a permit to install is not the type of "opportunity for hearing" referenced by MCL 24.291(1) and does not make the APA's contested case provisions applicable to MDEQ's decision to issue PTI 182-05C.

B. The Legislature has enacted more specific statutes governing the nature of hearings to be conducted in licensing matters, and the Legislature has clearly distinguished licensing matters where contested case evidentiary hearings are available from licensing matters where only public hearings are available.

The Legislature has demonstrated the ability to clearly differentiate between licensing decisions that are subject to evidentiary hearings under the APA's contested case provisions and licensing decisions that are subject only to non-evidentiary public hearings. For example, NREPA specifically allows owners and operators of existing sources to seek review of the MDEQ's denial

of an operating permit, which "shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act." MCL 324.5506(14). NREPA does not provide a similar right of review under the APA's contested case provisions for members of the public wishing to challenge the denial or issuance of operating permits or permits to install. Instead, NREPA provides for judicial review of decisions to issue operating or new source permits to install under the Revised Judicature Act, MCL 660.631. *See* MCL 324.5505(8); MCL 324.5506(14). The only hearing afforded members of the public in connection with the issuance of permits to install for new or existing sources is the opportunity for "public comment and a public hearing on the draft permit" before its issuance under MCL 324.5511(3).

The court of appeals has recognized the distinction made by the Legislature between contested case hearings and public hearings in NREPA, and it has ruled that MDEQ lacks the authority to hold contested case hearings where the Legislature has provided only for a public hearing. In *Wolverine Power Supply Cooperative, Inc v Dep't of Environmental Quality*, 285 Mich App 548; 777 NW2d 1 (2009), the court of appeals held that MDEQ lacked the authority under NREPA to promulgate a rule that allowed contested case hearings for permits to install major sources of air emissions. The court of appeals reviewed MCL 324.5505(8), which specifies that judicial review in the circuit court is the exclusive review procedure for new source permits to install, and MCL 324.5506(14), which specifies that contested case hearings are available to owners or operators of facilities seeking review of the denial of an operating permit. Based on that review, the court of appeals held:

> [W]hen read in combination with the provision for contested case hearings in subsection (14), the omission of contested case hearings in subsection (8) is purposeful. That omission, combined with the Legislature's reference to the "exclusive" means of judicial review, demonstrates to us that the contested case procedure is not available for decisions on *permits to install*.

Id. at 564-65, 777 NW2d at 10 (emphasis in original).

Both new and existing source permits to install are subject to the same NREPA requirement that MDEQ hold a public hearing on the draft permit before approving issuance of the final permit. MCL 324.5511(3). Under the holding in *Wolverine Power*, MDEQ's obligation to hold a public hearing before approving a new source permit to install does not convert the permitting decision into a contested case under the APA. Instead, MDEQ is prohibited from applying the APA's contested case provisions to its decision to issue a new source permit to install. The result for an existing source permit to install, which is subject to the exact same public hearing requirement, is no different.

C. The Environmental Groups' alternative argument that the APA's contested case provisions applied to MDEQ's decision to issue the Permit because AK Steel's predecessor-in-interest had a right to a contested case hearing if it had disagreed with MDEQ's decision is incorrect.

The Environmental Groups also have contended that the court of appeals reached the right result for the wrong reason because the Environmental Groups believe that AK Steel's predecessor-in-interest, Severstal, had a right to notice and a contested case hearing if it had disagreed with MDEQ's decision to issue the Permit. The Environmental Groups have argued that this right is found in either MCL 24.292(1) or Severstal's right to procedural due process. (Appellees' Answer, at 20-22.) Appellees are incorrect.

First, as to MCL 24.292(1), this provision of the APA does not apply. It states, in pertinent part:

> Before beginning proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of the facts or conduct that warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license . . .

This provision requires that the action be initiated by the agency. Here, Severstal initiated the action through the submission of an application for the Permit, PTI 182-05C, in accordance with Rule 336.1201(1)(b).[6] The action was not initiated by MDEQ. In addition, the issuance of PTI 182-05C had nothing to do with MDEQ providing Severstal with an opportunity to show it should retain its existing permit to install. Severstal initiated the application for issuance of the Permit precisely because it sought to modify and correct the requirements of PTI 182-05B.[7] MCL 24.292(1) simply does not apply to the PTI proceeding at issue.[8]

Second, the authorities cited by the Environmental Groups for the proposition that Severstal had a due process right to notice and a contested case hearing are inapplicable. *See Bisco's Inc v Michigan Liquor Control Comm*, 395 Mich 706; 717-22, 238 NW2d 166, 171-73 (1976) (holding that Liquor Control Commission must provide notice and an opportunity for an evidentiary hearing before denial of an application for renewal of a liquor license); *Bundo v City of Walled Lake*, 395 Mich 679, 696-97; 238 NW2d 154, 162 (1976) (holding that licensee must be provided notice and an opportunity for an evidentiary hearing before local legislative body can recommend non-renewal of liquor license to Liquor Control Commission); *Bois Blanc Island Twp v Natural Resources Commission*, 158 Mich App 239, 242-45, 404 NW2d 719, 721-22 (1987) (holding that Department of Natural Resources must provide notice and an opportunity for a contested case hearing under MCL 24.292 before terminating sanitary landfill permits). These

[6] *See* PTI Application, AR Permit File, Nos. 53 and 318.
[7] *Id.*
[8] MCL 324.5506(14) likewise did not create a right to a contested case hearing for Severstal. Appellees attempt to read the phrase "revision of any emissions limitation, standard, or condition" out of context in the first sentence of that subsection. The referenced emissions limitations, standards, or conditions are those contained in the operating permits or general permits referenced earlier in that sentence. This statutory provision simply does not relate to the permit to install at issue in this case. It also clearly contemplates a challenge to the revision by an aggrieved owner or operator of an existing source, not a situation where the owner or operator requested the revision.

cases all involve an agency taking away or refusing to renew an existing license. Here, the situation is completely different. Severstal was the party seeking to revise emission limitations in its existing permit to install. Severstal did not have the right to a contested case hearing even had MDEQ denied the requested modifications. The Environmental Groups cite no authority suggesting that an applicant is entitled to a contested case hearing when an agency refuses to grant the applicant's request for a new permit with materially different terms or refuses to grant the applicant's request for revisions to an existing permit that materially change its terms.

Moreover, MDEQ did not deny the modifications requested by Severstal, and Severstal was not an aggrieved party seeking to challenge MDEQ's decision. The Environmental Groups argue that this fact is irrelevant, but it is not. There is no due process right or statutory provision requiring MDEQ to provide notice and an opportunity for a contested case hearing to an applicant before granting that applicant's request to modify an existing permit. The only statutory requirement was that MDEQ provide public notice and a public hearing under MCL 324.5511(3).

RELIEF REQUESTED

For the foregoing reasons, and those in the application for leave to appeal, Intervening Respondent-Appellant, AK Steel Corporation, respectfully seeks an order: (1) granting AK Steel's application for leave to appeal; (2) *reversing* the decision of the court of appeals, (3) *holding* that MCL 324.5505(8) and MCL 324.5506(14) do not prescribe the applicable time period for filing a petition for judicial review of MDEQ's decision to issue the permit to install to AK Steel, and therefore the 90-day time period contained therein did not apply to the Environmental Groups' Claim of Appeal; (4) *holding* that the contested case provisions of Chapter 4 of the Michigan Administrative Procedures Act did not apply to MDEQ's decision to issue a permit to install to AK Steel, and therefore the 60-day time period for appeal prescribed by MCR 7.119 did not apply

to the Environmental Groups' Claim of Appeal, and (5) *granting* AK Steel's motion to dismiss for lack of jurisdiction because the Environmental Groups failed to file their Claim of Appeal within 21 days of the MDEQ's decision to issue the subject permit to install as required by MCR 7.123(B)(1) and MCR 7.104(A).

Respectfully submitted,

DRIGGERS, SCHULTZ & HERBST, P.C.

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Dated: May 19, 2017

CERTIFICATE OF SERVICE

I certify that on May 19, 2017, I filed the foregoing paper with the Clerk of Court using the Truefiling system which will electronically send notification to all counsel of record.

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